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April 2015

Small Business Bankruptcy Cases: A Viable Option

By Scott N. Opincar of McDonald Hopkins LLC. Reprinted with permission.

The term “small business case” was added to the Bankruptcy Code as part of the Bankruptcy Abuse and Consumer Protection Act of 2005. The purpose of the small business amendments is to expedite small business chapter 11 reorganization cases and to implement greater administrative oversight and control over small business debtors.

A “small business debtor” is defined in Section 101(51)(D) of the Bankruptcy Code as a person (defined as an individual, partnership or corporation) engaged in commercial or business activities (including any affiliate of such person), other than a person whose primary activity is the business of owning or operating real property or activities incidental thereto, that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the bankruptcy petition or date of the entry of an order for relief by the Bankruptcy Court in an amount not to exceed \$2,490,925

(excluding debts owed to one or more affiliates or insiders). In addition, the United States Trustee’s Office (a Department of Justice agency that acts as a watchdog in bankruptcy cases) must not appoint an unsecured creditors’ committee or the Bankruptcy Court must determine that a committee of unsecured creditors is not sufficiently active and representative to provide oversight of the debtor. Finally, a small business debtor does not include any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than \$2,490,925 (excluding debts owed to one or more affiliates or insiders).

The foregoing definition creates a practical problem for a debtor as it will not know until

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By Julie Koehne, Assistant Law Librarian, Systems

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after it files its chapter 11 petition as a small business case whether or not an unsecured creditors' committee will be appointed and, if so, whether such creditors' committee is sufficiently active and representative to provide oversight of the debtor. Rule 1020 of the Federal Rules of Bankruptcy Procedure provides that the debtor's self-designation as a small business debtor controls, unless and until the Bankruptcy Court enters an order that the debtor's statement is incorrect. Notwithstanding the uncertainty created by the language of the statute, the small business provisions of chapter 11 of the Bankruptcy Code provide a roadmap for a small business entity to avoid liquidation and to reorganize through an expedited and more streamlined process.

Listed below are certain benefits of being a small business debtor:

- There is no unsecured creditors' committee. Typically, an unsecured creditors' committee is appointed in a chapter 11 bankruptcy case to represent the interest of the debtor's unsecured creditors. A creditors' committee usually retains counsel and other professionals (with court approval) and the fees and expenses of such counsel and professionals are paid by the debtor's bankruptcy estate. Such fees and expenses are avoided in a small business bankruptcy case.
- Plan disclosure and solicitation alternatives. Section 1125 of the Bankruptcy Code requires disclosure of adequate information before the proponent of a plan of reorganization may solicit acceptances of the plan. A written disclosure statement must be approved by the Bankruptcy Court, after notice and a hearing, and must be sent to the hold-

ers of claims and interests together with the plan. In a small business case, the Bankruptcy Court may determine that a separate disclosure statement is not required because the plan itself provides adequate information. Consequently, the Court may permit the hearing on the adequacy of the disclosure statement to be held at the same time as the hearing to confirm the plan. A combined confirmation and disclosure statement hearing saves the time and expense of having two separate hearings. In addition, the Bankruptcy Court may approve a disclosure statement submitted on a standard form approved by the Court.

- Longer exclusivity period to file a plan. In a typical chapter 11 case, the debtor has the exclusive right to file a plan during the first 120 days of the bankruptcy case. Under Section 1121(e) of the Bankruptcy Code, a small business debtor has the exclusive right to file a plan during the first 180 days of the bankruptcy case, unless the exclusivity period is extended after notice and a hearing.

As set forth above, there is also greater administrative oversight and control over small business debtors in a small business chapter 11 case. Small business debtors must be aware of the following:

- Additional reporting requirements. A small business debtor must attach to its initial bankruptcy petition its most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return. In addition, Section 308 of the Bankruptcy Code requires a small business debtor to file periodic and other reports containing the following information: (i) the debtor's profitability; (ii) reasonable approximation of projected cash receipts and disbursements over a reasonable period; (iii) comparisons of actual

cash receipts and disbursements with projections contained in prior reports; (iv) whether the debtor has timely filed tax returns, paid taxes, and paid administrative expenses when due; (v) information on the failure to comply with the requirements set forth above and how the debtor intends to remedy such failures; and (vi) information on such other matters as in the best interest of the debtor and creditors, and in the public interest in fair and efficient chapter 11 procedures. These reports must be filed monthly on official forms unless the Bankruptcy Court orders otherwise. Failure to comply with the reporting requirements is ground for dismissal of the bankruptcy case.

- Duty to timely file all schedules and statement of financial affairs. The Bankruptcy Court may grant an extension, after notice and a hearing, but such extension shall not extend such time period to a date later than 30 days after the date of the order for relief absent extraordinary and compelling circumstances.
- Duty to maintain customary insurance.
- Duty to pay all taxes entitled to an administrative expense priority other than those being contested in an appropriate proceeding.
- Plan requirements. A small business debtor must file its plan and a disclosure statement on or before the 300th day after the date of the order for relief. Absent an extension granted by the Bankruptcy Court, the plan must be confirmed within 45 days after it is filed with the Court.

The small business provisions of the Bankruptcy Code provide an expedited, less costly, process for small business debtors to reorganize and avoid liquidation. The additional reporting requirements and plan deadlines must be stringently adhered to. Thus,

pre-planning for a small business bankruptcy is essential to complying with the roadmap set forth by Congress. For more information, contact [Scott Opincar](#).

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Attorneys Alison De Villiers and Kristen Myers will discuss Wage and Hour Issues on Friday, April 17 at noon in the Law Library.

You and the Legal System: Bankruptcy: Chapter 7 and Chapter 13

Attorneys Tammy Stickley and Nick Zingarelli will discuss Bankruptcy on Friday, May 1 at noon in the Law Library. This program was originally scheduled for March 20.

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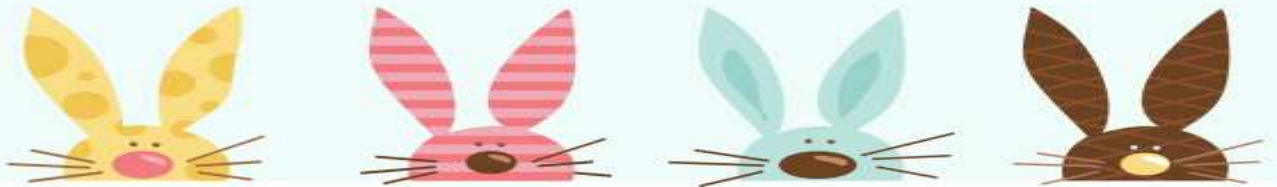
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May 1: You and the Legal System: Bankruptcy

May 13: CLE: Finding People Online

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